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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	
Tariff Filing Requirements for Nondominant Common Carriers	)	CC Docket No. 93-36

COMMENTS OF
TELE-COMMUNICATIONS ASSOCIATION

Tele-Communications Association ("TCA"), by its attorneys, hereby submits its comments in support of the Petition for Partial Reconsideration of the Memorandum Opinion and Order in this proceeding filed on September 22, 1993 by the Ad Hoc Telecommunications Users Committee ("Ad Hoc").[1] The Commission should grant Ad Hoc's petition in order to make long-term telecommunications service agreements mutually enforceable and conform its policies to those that apply in unregulated commercial markets.

I. THE ORDER PLACES TOO MUCH EMPHASIS ON THE EFFECTIVENESS OF A COMPETITIVE MARKETPLACE IN PREVENTING CARRIERS FROM ABROGATING LONG-TERM SERVICE AGREEMENTS.

Historically, the user community has strongly supported the Commission's pro-competitive initiatives. At the same time, however, such support has been tempered with a recognition that the realities of the marketplace -- even where competition exists -- may require the Commission to intervene in certain

[1] FCC 93-401 (released August 18, 1993) ("Order"). Public Notice of Ad Hoc's Petition was given at 58 Fed. Reg. 53204 (Oct. 14, 1993).

circumstances. The record in this proceeding reveals that many of the strongest user advocates of competition have identified tariff precedence as just such a circumstance. Specifically, TCA and seven other user parties urged the Commission to establish tariff review rules that give users the same rights to enforce service agreements that would pertain in an unregulated, competitive commercial marketplace.[2]

The Order dismissed this unified user request, stating that competition makes it "highly unlikely that nondominant carriers would unilaterally raise contract rates in tariff filings." In addition, the Order suggested that large users possess sufficient leverage to discourage such a course of conduct, and that the right to terminate without liability in the face of unilateral rate increases should be subject to negotiation between the parties. Consequently, the Commission required only that carriers notify users in advance of filing tariffs that will substantially alter the rates, terms, or conditions set out in underlying long-term contracts.[3]

There are several flaws in the analysis underlying the decision to reject a stricter tariff review standard for such coercive filings:

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[2] See Order at ¶ 20 and fns. 56 & 57 (citing pleadings filed by Ad Hoc, ABC/NBC, ARINC, Citicorp, GSA, ICA, TCA, and TSG).

[3] Id. at ¶ 25.

First, as Ad Hoc explains in its Petition, the mere presence of competition is insufficient to guarantee that carriers will not abrogate long-term service agreements.[4] Such conduct has occurred in the telecommunications marketplace,[5] and contracts are breached with regularity in the competitive commercial marketplace generally, notwithstanding the prospect of injury to the vendor's reputation.[6] Unlike telecommunications customers, however, commercial consumers have well-defined remedies for breach, and they certainly do not remain bound to unilaterally revised agreements that undermine the basis for their bargains.

Second, the Order does not explain why telecommunications customers should be forced to negotiate -- and undoubtedly to make concessions on rates or other terms and conditions -- in order to gain enforcement rights that are unquestioned in the unregulated marketplace. Such a requirement is wholly inconsistent with the Commission's otherwise laudable efforts to minimize the detrimental effects of regulation on the workings of a competitive marketplace. Promoting enforceability is not re-

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[4] Ad Hoc Petition at 6-8.

[5] See, e.g., Marco Supply Co. v. AT&T, 875 F.2d 434 (4th Cir. 1989)(conduct apparently was inadvertent, but tariff rates were enforced); Brookman & Brookman v. MCI, 86 Civ. 7040 (S.D.N.Y, judgment entered June 19, 1991); RCA American Communications, Inc., 2 FCC Rcd 2363, 2367-68 (1987), aff'd, Showtime Networks, Inc. v. FCC, 932 F.2d 1 (D.C. Cir. 1991).

[6] See Ad Hoc Petition at 5, 8.

regulation; it is simply adaptive regulation that recognizes the realities of commercial contracting.

Third, the Order erroneously assumes that only large users enter customized, long-term service agreements. AT&T alone has over 600 contract tariffs and 150 Tariff 12 offerings. MCI has hundreds of SCAs. Other IXCs have a multitude of equivalent service arrangements. Clearly, not all of these customers can be Fortune 500 companies, and most of them probably lack the bargaining power to protect their legitimate interests in enforceability. Preservation of contract rights should be a market rule, not a function of negotiating leverage.

Fourth, the Order erroneously assumes that the complaint process affords an adequate remedy for users whose service agreements are breached. As an initial matter, to obtain compensation, a user must bear the burden of proving that the carrier violated the "substantial cause" test. As TCA previously has explained,[7] the current formulation of this test is entirely inadequate to protect user interests -- and in any event, it is indefensible to require the user to demonstrate that the carrier has acted unreasonably in breaching a long-term service agreement, rather than to place the burden on the carrier to justify its actions.

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[7] Comments of TCA, CC Docket No. 93-36, filed March 29, 1993, at 3-4.

In addition, the complaint process typically endures for well over a year, or even two or more years. Since the average service agreement is only three years, this means that an aggrieved user must pay unlawful rates for most of the term of its service agreement. Because telecommunications costs comprise a substantial portion of total operating expenses for many users, the current tariffing policy would place customers at a significant competitive disadvantage in their own markets for a lengthy period of time. The complaint process offers no compensation for lost business resulting from an inability to be price-competitive.

Moreover, handling coercive tariff filings in the review process rather than the complaint process would more efficiently use the Commission's and affected parties' resources. Disputes generally would be resolved within a maximum of 120 days, rather than remain pending for two years or more. The burden of justifying the tariff would properly rest on the carrier, minimizing the need for protracted and contentious discovery as a mechanism for eliciting facts. And, review of a coercive tariff before it becomes effective will enhance the carrier's incentive to work with the Commission's staff and the customer to reach a mutually acceptable outcome.

In short, the Commission's current tariff policies, although intended to provide long distance providers the same freedom they would enjoy in any other competitive market (consistent with the

Communications Act), perpetuate a fundamental incongruity between the long distance market and other commercial arenas. The time to resolve this problem is past due, as TCA previously has explained.[8] Ad Hoc offers a straightforward approach to giving consumers in the competitive telecommunications marketplace the same rights they enjoy in other competitive markets. As discussed below, TCA endorses Ad Hoc's recommendations in full, and urges the Commission promptly to grant its petition.

II. THE STANDARD OF REVIEW FOR TARIFFS THAT ABROGATE LONG-TERM SERVICE AGREEMENTS SHOULD EMULATE THE UNREGULATED COMMERCIAL MARKETPLACE.

Ad Hoc recommends that the Commission incorporate the related contract law doctrines of impossibility, frustration of purpose, commercial impracticability, and failure of presupposed conditions into its test for "substantial cause."[9] TCA supports Ad Hoc's approach because it will establish a standard of review for tariff filings that is well understood and gives users the same certainty they enjoy as a matter of right in any other competitive marketplace.

Ad Hoc also recommends that the Commission improve its process for reviewing tariffs that abrogate underlying long-term

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[8] See Comments of TCA, CC Docket No. 93-36, filed March 29, 1993; Comments of TCA, CC Docket No. 92-13, filed March 30, 1992.

[9] Ad Hoc Petition at 10.

service agreements in five respects, each of which TCA fully supports:

First, Ad Hoc proposes that carriers filing tariffs that are inconsistent with underlying long-term contracts be required to give affected customers notice at least 15 days in advance of filing the tariff with the Commission.[10] Adopting this recommendation would give telecommunications users an opportunity to work with the carrier to resolve disputed issues prior to filing of the tariff, potentially avoiding the need for litigation before the Commission.

Second, Ad Hoc urges that carriers be required to identify the changes that the tariff will make to the long-term contracts, and should state their grounds for substantial cause for these changes.[11] This measure is eminently reasonable in light of users' substantial reliance interest in long-terms contracts. In addition, the requirement to precisely articulate a basis for claiming substantial cause should encourage carriers to consider more carefully whether abrogation of the long-term agreement is truly warranted.

Third, Ad Hoc suggests that tariff filings that would abrogate long-term service agreements be subject to a 45-day notice period.[12] TCA agrees that there should be a lengthened

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[10] Id. at 9.

[11] Id.

[12] Id.

notice period, but believes 120 days is more appropriate. A 120-day notice period is consistent with the need to protect legitimate user expectations in the enforceability of long-term agreements, and should give the Commission sufficient time to scrutinize the justification for the proposed tariff changes before their scheduled effective date.[13]

Fourth, Ad Hoc states that the Commission should suspend and investigate these filings as a matter of course, and should reject filings where substantial cause is not adequately demonstrated, is missing altogether, or is conclusively refuted.[14] Such an approach would subject carriers to the same rules that exist in other competitive commercial markets, and would recognize that there is no reasonable basis for distinguishing nominally regulated carriers from unregulated entities providing other types of services.

Fifth, Ad Hoc proposes that, if a carrier does satisfy the strengthened substantial cause test, then the affected customers

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[13] In a similar situation, the Commission already requires a 120-day notice period for price cap tariffs that seek to increase rates above the Service Band Index, and therefore must be supported by a substantial cause showing. 47 C.F.R. § 61.58(c)(3). The Commission has noted that "[o]ne of the fundamental premises of a price cap approach is that during the periods in which a given price cap is in effect, consumers have a legitimate expectation that they will not be paying rates in excess of those caps." Policy and Rules Concerning Rates for Dominant Carriers, 2 FCC Rcd 5208, 5215 (1987). Given the high expectation of stability in the case of tariffs that reflect long-term service agreements, a similar notice period appears to be warranted.

[14] Ad Hoc Petition at 10.

have the right to terminate service without liability, notwithstanding tariff or contractual provisions to the contrary.[15] Telecommunications users, like customers of services provided in unregulated markets, should not be forced to abide by agreements they would not knowingly or willingly enter.

TCA would add one final safeguard: the Commission should proscribe as unlawful, pursuant to Sections 201 and 205 of the Communications Act, tariff filings that abrogate rate stability commitments or material terms of long-term tariffs. This measure is necessary to ensure that tariffs reflecting long-term service agreements are not unilaterally revised to remove essential elements of the bargain between the parties.

III. CONCLUSION

For the foregoing reasons, TCA urges the Commission to grant Ad Hoc's Petition for Reconsideration.

Respectfully submitted,

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[15] Id.

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October, 1993, I caused copies of the foregoing "Comments of Tele-Communications Association" to be mailed via first-class postage prepaid mail to the following:

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